IN THE HIGH COURT OF JUDICATURE AT BOMBAY

T. & I. J.

CHAMBER SUMMONS NO.5 OF 2007

IN

T & I J PETITION NO.962 OF 2006

...

Devang Rasiklal Vora ...Petitioner

v/s.

Girish Matalia ...Respondent

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Mr.Simil Purohit i/b B.G.Saraf for the Petitioner.

Mr.Niranjan Pandit i/b M/s.Joy Legal Consultant for the Respondent.

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CORAM: D.K.DESHMUKH, J.

DATED: 29TH MARCH,2007

P.C.:

1. This Chamber Summons is taken out by the Petitioner for removal of the caveat. Admittedly the caveator is not related to the deceased whose will is propounded. He claims to be the purchaser of the property from the deceased.

2. In probate petition the court never inquires into the title of the deceased of the property which is mentioned in the Will. Only those persons who can claim inheritance to the property left behind by the deceased if the Will is declared invalid by the court can have caveatable interest in the property. A person like the Petitioner, who can not claim any inheritance in the property left behind by the deceased, cannot be said to have a caveatable interest in the property left behind by the deceased. In a probate petition the only issue which is decided by the court is whether the Will which is propounded is valid or has been made in accordance with law. The question whether the testator was the owner of the property is not relevant and cannot be decided by the Testamentary Court. Therefore, the Petitioner who only claims interest in the estate which is alleged to have been left behind by the deceased cannot have a caveatable interest.

2. The learned Counsel papering for the Petitioner/caveator relied on the judgment of the Division bench of Cherry High Court in the case of Thomas P. Jacob v/s. M.G.Varghese and ors, AIR 1987 Kerla 193 to claim that even a person who claims an interest in the property left behind by the deceased can file a caveat. Reading of that judgment shows that that judgment holds exactly to the contrary. The court has held that the question of title of the testator is never decided in a probate petition and therefore, obviously a person who has nexus only with the property of the testator in the capacity other than as an heir cannot have a caveatable interest.

3. The supreme court in its judgment in the case of Chiranjilal Shrilal Goenka v/s. Jasjit Singh and ors, (1993) 2 SCC 507 has held that in a probate petition the question of title to the property is never decided and a probate petition is to be decided in accordance with the provision of Succession Act and therefore, no question of title can be decided.

3A. Perusal of the affidavit filed in support of the caveat by the caveator shows that only dispute that

the caveator has raised is that Smt.Pushpa Rasiklal Vora the deceased had transferred flat No.3, first floor, Sudha Co.operative Housing Society, Patel Compound, 20 Nepean Sea Road, Mumbai-400 036, in his favour by sale deed dated 6th May, 1989 and therefore he is the owner of the flat, but still the said deceased during her life time had filed Suit No.493 of 2000 for a decree of possession of that flat. According to the caveator though the deceased had transferred the flat in his favour, still in her Will she has shown that she is owner of the flat and therefore to contest that position he has filed the caveat. The question whether the deceased was the owner of the flat in question at the time of her death will not be decided in the probate petition. Whether the flat was validly transferred in favour of the caveator by the deceased or not is a question which may be decided in the civil suit which has been filed by the deceased and is pending in the court, and therefore, in my opinion, the caveat will not be maintainable. It is also a settled law that when the caveator claims adversely to the deceased, the caveat filed by him is not maintainable. Perusal of the affidavit filed in support of the caveat clearly shows that the caveator is claiming adversely to the

deceased and therefore for that reason also the caveat is not maintainable.

4. Thus, it is clear that the caveator was not justified in filing a caveat. Filing of a caveat has resulted in keeping the petition pending and its conversion into suit. Therefore, the Petitioner is entitled to have his chamber summons granted. The Petitioner is also entitled to costs from the caveator. Chamber summons is, therefore, granted in terms of prayer clause (a). The caveator is directed to pay as and by way of costs of this chamber summons Rs.10,000/- to the Petitioner.

At this stage a request is made for stay of the operation of the order. Request is rejected.

Parties to act on ordinary copy of this order duly authenticated by the Associate/ Private Secretary of the court as a true copy.

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